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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH *TRANS WORLD AIRLINES, INC. V. THURSTON,* BECAUSE IT PERMITS A BFOQ TO BE ESTABLISHED BASED SOLELY ON THE EMPLOYEE'S INABILITY TO PERFORM A DIFFERENT JOB.

Respondent refused to employ petitioners as flight engineers after age 60 solely because the FAA's age 60 rule precluded them from serving as captains. Respondent summarized its position as follows:

> "[T]he only rule American Airlines had or has is that [ ] a person must be able to and be a future captain in order to be a flight officer." (Tr. 763)[1]

Terminating petitioners' employment because they can no longer serve in a different position than the one requested is squarely in conflict with *Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 105 S.Ct. 613, 622-23 (1985), decided following the Fifth Circuit's decision in this case. In *TWA*, this Court stated that a denial of flight engineer employment, based solely on the inability to serve as captain after age sixty, violated the Age Discrimination in Employment Act because it was not the position of captain but rather the " 'particular' job of flight engineer from which the respondents were excluded by the discriminatory transfer policy." 105 S.Ct. at 622.

Nor can respondent credibly distinguish the decision in *TWA* on the ground that the airlines' operations are different. Both respondent and TWA are commercial airlines closely regulated by the FAA. They fly several of the same types of aircraft. Contrary to respondent's representation (Opp. at 11, n. 5), both permit downbidding (transfers) in a wide variety of circumstances.[2] Not only may

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[1] The vice-president responsible for respondent's age 60 compulsory retirement policy stated that one of the important considerations in his mind was the applicability of the FAA's age 60 rule. (Tr. 335-39) A second vice-president said that the only reason petitioners could not serve as flight engineers past sixty was because they "could no longer serve as a pilot." (Tr. 131) A third official explained that petitioners were not qualified for flight engineer service because they were "no longer promotable in the cockpit as a pilot." (Tr. 676)

[2] More than 800 downbids from pilot positions occurred during 1980-1982 alone (PX 790, 791; Tr. 167-68), with more pilots downbidding in status than promoting. (Tr. 169, 333) Respondent's statement that it " 'would' not permit any captain, regardless of age,

(Footnote continued on following page)

pilots on both airlines downbid voluntarily, but respondent sometimes requires its pilots to downbid when their services are needed in lower cockpit positions. (Tr. 143, 146, 147)

While respondent claims to rely on facially neutral policies (called "up-or-out" and "capable of progression"), those policies were presented as a denial of discrimination based on age, and were never offered to support an age-based BFOQ.[3] Moreover, the "up-or-out" requirement was satisfied by petitioners and the "capable of progression" provision, as applied to petitioners, was nothing more than a way of conditioning their employment on their ability to serve as a captain, a different position. This Court foreclosed such a device in *TWA*:

> [I]t is the "particular" job of flight engineer from which the respondents were excluded by the discriminatory transfer policy. * * * TWA can [not] make dependent upon the age of the individual the availability of a transfer to a position for which age is not a BFOQ.

TWA, 105 S.Ct. at 622, 623.

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[2] *continued*
voluntarily to downbid to the flight officer position" (Opp. at 4, see also 7, 11 n. 4) may be in reference to a policy for the future, but it is flatly contrary to the record, as well as to the trial court's summary judgment decision (App. 18), which confirmed the right of captains under age 60 to downbid to flight engineer positions. (Tr. 129-30, 136, 163-64, 173, 443, 675, 176-77, 316-17, 321, 323, 330, 694-96)

[3] Respondent's statement that new flight officers are "required to advance to copilot and, ultimately, to captain" (Opp. at 3) is misleading. Crewmembers are required, ultimately, to qualify for the next higher position, but are permitted, once qualified, to bid for any vacancy. (Tr. 675)

II.

THE DECISION BELOW PERMITTING AN EMPLOYER TO ESTABLISH A BFOQ WITH EVIDENCE UNRELATED TO AGE DISTORTS THE ADEA AND IS INCONSISTENT WITH THE NARROW INTERPRETATION FOR STATUTORY EXCEPTIONS REQUIRED IN *DOTHARD v. RAWLINSON.*

Respondent concedes that its BFOQ was based almost wholly on non-age justifications, despite the statutory requirement that "age" be a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1). In support of its contention that a BFOQ may be founded on factors other than age, respondent cites this Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1979). (Opp. at 13-14) Respondent's erroneous reading of *Dothard*, if applied generally, would emasculate the ADEA and would broaden the BFOQ which "was in fact meant to be an extremely narrow exception." *Dothard*, 433 U.S. at 334.[4]

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[4] Respondent contends, despite a reluctance to do so below, that its refusal to employ the captain petitioners was based, in fact, on their age. In support, respondent relies on a remark by its expert that "people do become rigid as they get older." Unfortunately, respondent misquotes the testimony (*See* Tr. 510: "entirely *possible* that *some* senior Captains . . . would be *less* able to conform their behavior . . ."). Even more important, respondent never seriously relied on this testimony to support its BFOQ defense, nor could it. First, the remark—not tied to *any particular age*—is one of those bald stereotypical generalizations that the ADEA was enacted to prohibit and, second, it fails to address an essential element of respondent's burden: that "it is impossible or highly impractical to deal . . . on an individualized basis" with persons over 60 years of age. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d at 236. According to respondent, its system of individual evaluation of crewmembers' abilities and crew coordination, even under simulated emergency conditions, is "almost a hundred percent." (Tr. 200)

In *Dothard*, sex was not merely tangentially involved, but was the essence of the women's disability. As noted by the Court, the correctional counselors against whom the BFOQ was asserted were unqualified because their "very womanhood would . . . undermine her capacity to provide . . . security. . . ." *Dothard*, 433 U.S. at 335-36. By contrast, the respondent here does not dispute the ability of flight engineers over 60 years of age to perform the job in question, nor does it defend its "policies" on the basis of any disability due to the statutorily-protected characteristic—age—as was the case in *Dothard*. Indeed, as respondent reminds the Court, it employs flight engineers to age 70.[5]

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[5] Petitioners Malandro, Fenton and Thompson are indistinguishable from respondent's career flight engineers. None served as a captain for respondent and all worked as flight engineers up to their sixtieth birthdays, when they were forced to retire. Respondent claims that these "non-captain age 60 pilots could not safely fill the flight officer [engineer] job because they would impede the training of American's future captains." (Opp. at 13) Like respondent's 480 career flight engineers, who also "impede," these four petitioners had sufficient seniority to serve on widebody equipment, which was not used for training upgrading flight engineers. (Tr. 228, 462) Petitioners' service as flight engineers to age 70 concededly would have no effect on the ability of anyone to accumulate the two or three years in the flight engineer job felt beneficial. (Tr. 229-30) Actually, respondent had no minimum flight engineer service requirement for its crewmembers. (Tr. 117-18) Some never served as flight engineers, or served as little as 30 days (Tr. 398A, 440-41); others served more than twelve years. (Tr. 439-40)

III.

REVIEW SHOULD BE GRANTED WHERE, AS HERE, THE BFOQ INSTRUCTION PERMITTED THE AGE-BASED DEFENSE TO BE ESTABLISHED WITHOUT REQUIRING THAT THE AGE LIMITATION BE "REASONABLY NECESSARY" TO THE OPERATION OF A COMMERCIAL AIRLINE AND WHERE, AS HERE, ANY REASON AT ALL—SO LONG AS IT WAS ARGUABLY SAFETY-RELATED—WAS ALLOWED TO SUPPORT THE BFOQ.

Respondent concedes that it had to prove that "age was a BFOQ 'reasonably necessary' to the safety of its operations" (Opp. at 10), but defends the trial court's jury instructions by arguing that they required the establishment of "policies" meeting the statutory standard of "reasonably necessary" rather than the lesser "reasonable" or "rational basis" standard. In fact, the jury instruction given by the trial court permitted the jury to conclude that respondent had established a BFOQ defense if it found that respondent's "policies" were merely "reasonable." Although the phrase "reasonably necessary" appears in the court's remarks to the jury, respondent fails to mention (Opp. at 16 n. 10) that the first reference was included as part of "Defendant's Contentions," while the others were part of a rote introduction to the technical statutory text, which was followed immediately by language explaining how the standard could be met.[6] The clear thrust of the instructions, taken as a whole, permitted respondent to argue as follows to the jury:

> American need only show it holds a reasonable basis for its assessment of safety risk involved. *It doesn't*

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[6] The trial court instructed that "American need only show that it has a reasonable basis for its assessment of the safety risk involved." (Tr. 789)

> *have to show that it was right*, but that it has a reasonable basis for its assessment of the safety risk involved. . . . You're the people to decide today whether American had a reasonable basis for believing as it did, if you reach that question.

Tr. 764 (emphasis supplied)

Not only did the BFOQ instruction apply an incorrect standard of proof, it also permitted the jury to find a BFOQ based on factors other than age.[7] Analysis of respondent's three references to the trial court's use of "age" in its instructions reveals that one was in the portion of the instructions describing defendant's contentions, while another was in the "willful violation" section, which the jury never considered in reaching its verdict. The third reference was prefatory to the BFOQ charge, and was followed immediately by an explanation that respondent could meet its statutory burden simply by presenting non-age related evidence, including evidence of "the effect that allowing Plaintiffs to serve as flight officers would have on the safety of . . . American's operations because of its effect on its other employees, crew command structure, training program, *or any other reason relating to safety*." (Tr. 790; emphasis supplied)[8]

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[7] Based on the court's jury instructions, the jury found that respondent's "policy not to allow plaintiffs to occupy or continue to occupy the flight officer position" was based on a bona fide occupational qualification. (Tr. 837) Respondent's claim that the jury found the policy to be "reasonably necessary to the safety of the airline's flight operations" and that such "policies enhanced the safety of its operations" (Opp. at 18) is simply argument and highlights the erroneous jury instruction below, as well as a special interrogatory not requiring the BFOQ to be based on age.

[8] Respondent contends, flatly contrary to the record, that petitioners failed to object to the BFOQ instruction on the ground that it stated only a "rational basis" or "reasonableness" stand-

(Footnote continued on following page)

IV.

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Respondent boldly asserts that this Court's pending review of *Western Airlines, Inc. v. Criswell*, No. 83-1545, "will not affect the outcome of this case." Respondent, however, offers no distinction sufficient to warrant its claim that "entirely different issues are presented for review." (Opp. at 18)[9] And while the BFOQ instruction in *Western* was based virtually verbatim on *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976), the charge here differed significantly from *Tamiami*. By acknowledging "that a consistent legal standard must apply to all airlines . . ." (Opp. at 12), respondent concedes the necessity for providing a uniform statutory standard on the BFOQ defense.

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[8] *continued*
ard of proof, rather than the statutory "reasonably necessary" standard. (Opp. at 15) In fact, petitioner's counsel objected to the instruction specifically on this basis, stating that "to use a rational or reasonable standard in a BFOQ instruction is erroneous . . . and the words of the Statute "reasonable and necessary" (sic) should be followed and not the substitution of the lesser standard, "rational or reasonable basis." (Tr. 801; 798-99)

[9] In February 1984 Western Airlines permitted, without objection, the entry of a preliminary injunction returning age 60 captains to flight engineer positions *pendente lite*. Before that, it opposed flight engineer service after age 60. Respondent, on the other hand, permits its flight engineers to continue to age 70, except those who, like petitioners Malandro, Green, Thompson and Fenton, are not on the closed career flight engineer seniority list.

CONCLUSION

For the reasons stated above and in the Petition, a Writ of Certiorari should be issued to review the opinion and judgment of the Fifth Circuit.

Respectfully submitted,

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